

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000922-ME

MIRIAM CELESTE BYERS,
(N/K/A CONNER)

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 02-CI-00967

BRADLEY KEITH BYERS

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

KELLER, JUDGE: Miriam Celeste Byers, now known as Miriam Celeste Conner

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(Conner), appeals from the McCracken Family Court's order denying her motion to modify timesharing and the court's order denying her motion to alter, amend, or vacate. On appeal, Conner argues that the court abused its discretion in denying her motions because the evidence compelled a contrary result. Bradley Keith Byers (Byers) argues the evidence supported the court's determination and that the court did not abuse its discretion. Having reviewed the record, we affirm.

FACTS

Conner and Byers married on October 25, 1997. Two children were born of the marriage, Miriam Elizabeth (Elizabeth), born on August 8, 2000, and JonCade Alexander (JonCade), born on February 19, 1998. The parties separated on August 12, 2002, and dissolved their marriage on March 21, 2003. The decree of dissolution granted the parties joint custody of the children with Byers having "primary physical possession"² and Conner having standard timesharing.³

Other than some disputes regarding child support, the parties appear not to have had any problems that required judicial intervention until October 2006, when Conner filed a petition to change the primary residential parent. In her petition, Conner alleged that Byers had abused Elizabeth by paddling her and leaving a bruise and that Conner also paddled JonCade. Byers reported the alleged

² The record contains references to "primary physical possession," "residential custodian," and "primary residential custodian." In *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), the Supreme Court of Kentucky stated that the appropriate term is "primary residential parent." Therefore, we use that term herein.

³ The record contains references to "visitation," which has now been supplanted by "timesharing." We use "timesharing" in this opinion.

abuse to the Cabinet, which investigated the abuse and developed a plan that required Byers to undergo parenting classes and refrain from spanking the children.

At the hearing on Conner's motion, the parties testified that: each had cooperated with regard to altering visitation but the other had not; each had cooperated with regard to getting counseling for JonCade but the other had not; and Byers was or was not verbally abusive to Conner. Additionally, the parties called witnesses to testify regarding their respective parenting abilities; Byers's participation in the children's school, church, and extracurricular activities; Conner's lack of participation in those activities; and the children's progress in school. Following the hearing, the court entered an order denying Conner's motion, finding that it was in the best interests of the children to remain with Byers as primary residential parent. Additionally, the court ordered Byers to refrain from corporal punishment.

In October 2007, Byers filed a motion to modify timesharing, arguing that the standard schedule was unfair because of the distance between the parties' homes. During the hearing on this motion, Conner alleged that, while Byers had not been spanking the children, his wife, Andrea, had. The court revised the visitation schedule and ordered both Byers and Andrea to refrain from spanking the children.

Following a period of relative quiescence,⁴ Conner filed a motion to modify timesharing in January 2011. In support of her motion, Conner alleged that Byers excessively punished the children by: confining them to their rooms for several weeks; forbidding them from talking; making them eat in their rooms; forbidding them from reading; making them stand with their noses in the corner for long periods of time; and making JonCade withdraw from extracurricular school activities. Conner also alleged that Byers refused to help the children with their schoolwork.

At the hearing on Conner's motion, the parties again presented evidence through their own testimony and witnesses regarding each other's relative strengths and weaknesses as parents. Additionally, Conner testified that Byers refused to let Elizabeth sit with her during JonCade's extracurricular/church activities; that Byers shared with JonCade derogatory e-mails between Byers and Conner; and that Byers discussed the parents' disputes with both children.

As to the punishment, Byers stated that the children were not forbidden from talking to anyone, only from talking to their siblings. While the children did eat in their rooms, they were in view of the rest of the family, who ate in the living room. Byers did occasionally make the children stand in the corner with their noses to the wall but only for five to ten minutes at a time, and did keep JonCade from participating in two voluntary after-school weightlifting programs.

⁴ There were disputes regarding passports for the children, reimbursement of medical expenses, payment of child support, and timesharing. However, those disputes are not pertinent to this appeal.

Byers admitted that, on occasion, he did not let Elizabeth sit with Conner during JonCade's extracurricular/church activities because Conner would "play with" Elizabeth rather than paying attention to JonCade. He also admitted that he did, on occasion, share e-mails between Conner and him with JonCade and that he discussed the parties' disputes with JonCade and Elizabeth.

After hearing from the parties and their witnesses, the court interviewed the children. Elizabeth stated that she was "kinda used to" being grounded but does not like it. She indicated that she was treated "decent" at Byers's house, that she got more things at Conner's house, and that she likes all of the adults involved and being at both houses. JonCade stated: that he understood about the dispute between his parents; that he had been grounded for getting a bad grade; that he had been forced to stand in the corner sometimes for up to an hour; that he complained about the punishment to Conner; that he wanted to stay with Byers because he has friends there; that he gets help with his homework from both parents and his stepsister; and that he had seen several e-mails between his parents.

Following the hearing, the court denied Conner's motion finding:

That it is in the best interest of the minor children for the children to continue to reside with the Petitioner with the present time share arrangement to remain in effect. The children have resided with Petitioner since the initial custody decree in 2003. Per the many witnesses' testimony and [the] Court's observations, the children are well mannered and behaved. The children have excelled academically and are involved socially in church and extracurricular activities. Petitioner has provided the

children with a stable home and has to be attributed with raising such good children. Furthermore, based on this Court's interview of the children, they do not wish for there to be a change in their current living arrangements.

The Court does find that Respondent is married to an Emergency Room Physician who resides primarily in Florida. The Respondent has provided the children with a stable home in Kentucky during her visits with the minor children. The Court believes Respondent would make a proper residential custodian if there was a problem with the present time sharing arrangement. However, the Court does not find a problem presently exists with the present time share arrangement and does not want to modify a time share arrangement which is presently working successfully.

The primary issue raised by Respondent was the discipline of the minor children by the Petitioner after the mid-term grades were received in November 2010. The Court does find that the discipline by Petitioner may have been excessive, but said discipline does not rise to the level of abuse.

Conner filed a motion to alter, amend, or vacate, which the court denied. In its order denying that motion, the court corrected a "typographical error" stating that, rather than finding that "the discipline by Petitioner may have been excessive," it meant to find: "That to some people's standards the discipline may have been excessive, but this Court does not find the discipline excessive. To the contrary, the Court likes the fact that someone is actually disciplining children. The Court does not find that the discipline was abusive." Conner appeals from the court's order denying her motions to change timesharing and to alter, amend, or vacate.

STANDARD OF REVIEW

Whether to grant or deny a motion to change timesharing is within the sound discretion of the court. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). In reviewing the court's findings, we grant “due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rule(s) of Civil Procedure (CR) 52.01. We will not set aside the trial court's findings of fact unless they "are clearly erroneous [and] . . . manifestly against the weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). With these standards in mind, we address the issue raised by Conner on appeal.

ANALYSIS

Conner argues that the court's findings are clearly erroneous and not supported by the evidence. We disagree.

We note at the outset of our analysis that "there is no statute that specifically addresses modification of timesharing in a joint custody setting [S]ince the nature of the custody does not change, the trial court is not bound by the statutory requirements that must be met for a change of custody, but can modify timesharing based on the best interests of the child" *Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008). In this case, the court found that the children: have lived with Byers as primary residential parent in a stable home since 2003; have excelled academically; are involved in school, church, and extracurricular activities; and do not want to change their living arrangements. Based on the preceding factors, the court concluded that it is in the best interests of the children for Byers to remain as primary residential parent. These findings are

supported by testimony from the children, Byers, and several related and non-related witnesses. Based on that evidence, we cannot say that the court abused its discretion in upholding the status quo.

Although we need not do so, we briefly address Conner's argument that the court, if it had been guided by the factors in KRS 403.270(2), would have been compelled to reach a different conclusion. As noted above, the court was not required to rely on those factors; however, had it done so, the evidence would not have compelled a different result.

KRS 403.270(2) provides that the court must consider the best interests of the child when determining custody, taking into account the following relevant factors:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720

As reflected in the record, the children stated that they did not want to alter their living arrangements. Testimony indicated that the children interacted well

with both parents and their respective spouses, their stepbrother and stepsister, and relatives on both sides of their extended families. The children have done well in school, have friends in both parents' neighborhoods, are involved in extracurricular activities at their school, are involved in activities at both parents' churches, and appear to be well adjusted. There are no indications that any of the individuals involved have any mental or physical issues.

The only KRS 403.270(2) factor at issue is the parents' wishes. It appears that Conner wishes to become primary residential parent and that Byers would use less stringent discipline, and Byers wishes to remain primary residential parent and that Conner would become more of a disciplinarian. Conner's protestations to the contrary notwithstanding, the court's finding that Byers's discipline is acceptable is supported by the record. The evidence does not compel a finding in Conner's favor on any of the KRS 403.270(2) factors; therefore, even if the court had specifically addressed those factors, it would not have been compelled to rule in Conner's favor.

CONCLUSION

As is often the case, the family court was forced to choose between two apparently loving and capable parents. Although Conner disagrees with Byers's discipline methods, the evidence supports the court's finding that those methods are not abusive or excessive. Because the evidence does not compel a contrary result, we affirm the family court's judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery P. Alford
Paducah, Kentucky

BRIEF FOR APPELLEE:

Tiffany Gabehart Poindexter
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